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No. 94-1039

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,
Petitioners,
v.
RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

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BRIEF AMICI CURIAE OF AFFIRMATION: UNITED METHODISTS FOR GAY, LESBIAN AND BISEXUAL CONCERNS; AXIOS USA, INC.; THE BRETHREN/MENNONITE COUNCIL FOR LESBIAN AND GAY CONCERNS; DIGNITY/USA; EVANGELICALS CONCERNED, INC.; INTEGRITY, INC.; LUTHERANS CONCERNED/NORTH AMERICA; PRESBYTERIANS FOR LESBIAN/GAY CONCERNS; UNITED CHURCH COALITION FOR LESBIAN/GAY CONCERNS; and THE WORLD CONGRESS OF GAY AND LESBIAN JEWISH ORGANIZATIONS IN SUPPORT OF THE RESPONDENTS

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IDENTITY AND INTEREST OF THE AMICI CURIAE

We address the Court as Jews and Christians who depend in our society upon all of the full panoply of civil liberties guaranteed us by the First Amendment to the Constitution of the United States. As groups consisting largely of Christian and Jewish gay males, lesbians, and bisexuals, our organizations have unanimously adopted as our unified purpose to speak, to advocate, to publish, and to petition for recognition of our inalienable rights.

Our religious commitment and tradition propel us to claim the rights of citizenship of our constituents and to call upon this Court to honor its mandate and tradition of safeguarding the fundamental rights of all citizens of this Nation, no matter how despised or unpopular. While we fully support the equal protection rights, as briefed by the Respondents, and the rights secured by the religion clauses, as briefed by other amici supporting the Respondents, we submit this Brief to demonstrate the massive infringement by Amendment 2 of the First Amendment rights of speech and petition.

A. Our Identity

Affirmation: United Methodists for Gay, Lesbian and Bisexual Concerns consists of lesbians, bisexuals, gay men, and their friends, families and supporters who affirm full participation of all persons in the United Methodist Church. We celebrate God's gifts of sexuality and sensuality, with all their blessings for intimacy, relationship and personal growth. We have organized to care for one another, to represent our concerns to and with the United Methodist Church, and to speak boldly for the inclusion of all people. We seek to respond positively to God's love to all persons and, in doing so, speak in a prophetic voice to church and society.

Axios USA, Inc. is an organization of gay and lesbian lay Christians. We work for the knowledge and understanding of men and women of homosexual orientation among the public and within the institutions of the

various Eastern Orthodox, Oriental Orthodox (Non-Chalcedonian), and Eastern-Rite Catholic Churches by means of educational and charitable activities. Our members engage in research and dialogue with church authorities and members of the gay and lesbian community. We honor, among others, the lives and martyrdom of Saints Sergius and Bacchus (recognized by both Catholics and Orthodox), whose accepted *martyrium* has one calling the other "sweet campanion and [erotic/romantic] lover." They were martyred at the turn of the third century A.D. for refusing to worship Jupiter. Their love for each other inspired those around them and us today.

The *Brethren/Mennonite Council for Lesbian and Gay Concerns* is organized for purposes of the advancement of education regarding lesbian, bisexual and gay male concerns in the church and in general society—especially the elimination of prejudice and discrimination, the defense of civil rights secured by law, and the development of social activities and public or professional services for the betterment of lesbians, bisexuals and gay men and of the Brethren and Mennonite churches.

Dignity/USA is a national organization of gay, lesbian, and bisexual Catholics; their families; and friends. This year, we celebrate twenty-five years of ministering to the spiritual needs of the gay, lesbian, and bisexual community. We have eighty-five affiliated chapters throughout the country, and each week we provide spiritual nurturing to the thousands of our members of the gay community who seek guidance and renewal. We live our beliefs by joining with other lay organizations of the Roman Catholic Church in proclaiming our Catholicism and our beliefs in living the Gospel message. Dignity/USA seeks to be an instrument through which its members may be heard by the institutional church and society. We seek to speak our conviction that we, as gay people, can express our sexuality in a maner consonant with Christ's teaching and that we can express our sexuality physically in a unitive manner that is loving, life-giving, and life-affirming.

We encourage our members to work for justice and social acceptance through education and legal reform.

Evangelicals Concerned, Inc. is a national organization dedicated to assisting lesbians and gay men and churches better to understand homosexuality and the good news of God's grace and peace. We fulfill our purpose of providing a fellowship of Christians concerned about the interface between Christian life and homosexuality by, among other things, publishing literature and conducting professional fora and educational colloquia on homosexuality and Christian life.

In *Integrity, Inc.*, we hold our mission to be the witness of the lesbian and gay community in the Episcopal Church and of the Episcopal Church in the lesbian and gay community. We engage in a ministry of worship, education, advocacy, fellowship, and service. We started out as a newsletter in rural Georgia and have grown to more than seventy chapters in the United States, Canada, and Australia. Our membership is open to all who support gay and lesbian rights in the Episcopal church, and we are proud to count several of our bishops among our membership. In 1993, we adopted a resolution calling upon "our national church and the agencies and institutions which report to it to refrain from scheduling General Convention, other meetings or official activities in the State of Colorado until such time as Amendment 2 is repealed or overturned." At last year's General Convention of the Episcopal Church, some 27 openly lesbian and gay deputies, elected by dioceses, played a role in the Convention's passage of several pro-gay resolutions, including the call for the inclusion of sexual orientation in state and federal civil rights laws.

Lutherans Concerned/North America, Inc. stands as a community of faith, modeling the gospel within the church and within the lesbian and gay community. We seek to embody the Gospel's principles of inclusiveness and justice, celebrating God's gifts of sexuality and diversity. Our members serve as pastors, officials, and lay leaders with-

in the Lutheran Church. Our goals are to affirm the God-given nature of sexual orientation, to proclaim the good news of Jesus Christ through inclusive worship and to promote positive changes in all expressions of the Lutheran Church, including the Evangelical Lutheran Church in America; the Lutheran Church—Missouri Synod; and the Wisconsin Evangelical Lutheran Synod. In furtherance of these goals, we have adopted as our logo a combination of the fish and pink triangle, a symbol that visually unites symbols of our Christian faith and courage against sexual discrimination. The *ichthus,* or fish symbol, originated as a secret recognition sign when Christians in the Roman Empire were persecuted for their faith. The pink triangle was used by the Nazis to identify tens of thousands (no one knows exactly how many) of European homosexuals who were persecuted by, and murdered in the death camps of, the Third Reich. The triangle shape also symbolizes the Holy Trinity. Both symbols are now used by our respective communities today as signs of honor and support. We unite them to show that Christian life and human sexuality can be reconciled into one. Through our ministry, we seek to help the hurting and to speak up for those who cannot risk openness.

Presbyterians for Lesbian/Gay Concerns is a "special organization" within the Presbyterian Church (U.S.A.). We report annually to the Theology and Worship unit within the national headquarters of the Presbyterian Church (U.S.A.). Through proclamation of the liberating and inclusive Gospel of Jesus Christ to all people, we seek to facilitate, by the distribution of educational materials and otherwise, the intelligent consideration by Presbyterian governing bodies of support for legislation prohibiting discrimination on the basis of affectional and sexual preference or orientation and for legislation deleting restrictions on the private sexual behavior of consenting adults.

United Church Coalition for Lesbian/Gay Concerns affirms, empowers, educates, and advocates, providing support and sanctuary to all our lesbian, gay, and bisexual sisters and brothers, their families and friends. We advocate for full civil rights and bring Christ's affirming message of love and justice for all to the Church and society. We affirm the good news that all persons without regard to sexual orientation are loved and empowered by God, and we promote ministries of pastoral care, education, and advocacy within the United Church of Christ and society as a whole. We enjoy a good working relationship with the various instrumentalities and administrative officers of the United Church of Christ.

The *World Congress of Gay and Lesbian Jewish Organizations* has over fifty member organizations throughout the world. To have voting or associate member status in the World Congress, an organization must be a primarily Gay and/or Lesbian and a primarily Jewish organization. Many of our member organizations are religious communities and congregations, most of which are affiliated with the United Hebrew Synagogues of America. We are established in order to coordinate and promote educational and development programs for gay and lesbian Jewish groups throughout the world and to further the concerns of the World Congress in the wider Jewish and gay/lesbian communities. We pursue the eradication of sexism, homophobia, and anti-semitism through educational programs. Thus, for instance, one of our member organizations, the Society for the Protection of Personal Rights, planned and scheduled a ceremony last year at Yad Vashem to commemorate the six million Jews slaughtered by the Nazis in World War II, including the five to ten percent among them who were homosexual men and women. The World Congress participated in this ceremony, which was disrupted by dissenters. We stood together as proud gays and lesbians, facing down the disrupters with our singing and our faith.

B. Our Interest As Amici

As Jewish and Christian gay people dedicated to the mandates and promises of our faiths, we claim our right to this Court's vigilant guardianship over our fundamental rights as citizens of this Nation, including our First Amendment rights of speech and petition. Speaking on January 29, 1995, to the Church of the Covenant, a federated church of the United Church of Christ and the Presbyterian Church (U.S.A.) in Boston, Massachusetts, Roger S. Powers commended:

> Like the abolitionists of the nineteenth century who fought against slavery, like the suffragists who fought for the rights of women, and like the African-American churches that fought for civil rights, we are fighting today for gay rights, and with God's help, we, too, shall overcome . . . *We have a responsibility to speak the truth* to them, but to do so with love and compassion in ways that they can hear us and not simply reject us out of hand . . . .

The responsibility to speak of which Mr. Powers admonished is borne of our faith and our commitment to a God of equality and justice. As Americans, our innate right to proclaim this message and to claim its implications is guaranteed through our Constitution.

A prominent purpose of our organizations, in exercise of our First Amendment freedoms of speech and petition, is to claim our rights as equal citizens in this country and in God's world order. By forbidding the promulgation or enforcement of any law or regulation that would entitle our members "to claim" protection, Colorado's Amendment 2 forbids that which our religious faith and civic conviction require us to do.

To remove any doubt, we stand before this Court to give witness to the fact that gay people in the United States encounter discrimination in a multitude of invidious ways. One need only look to the law of this Court to discover how pervasively society demeans us. We hold

our loving relationships of companionship to be "a coming together for better or for worse, hopefully enduring, and *intimate to the degree of being sacred.*" *Griswold v. Connecticut,* 381 U.S. 479, 486 (1965) (all emphasis herein supplied unless otherwise indicated). Yet, even certain expressions of our love—which we believe to be blessed by God—have been deemed by this Court to justify criminalization and imprisonment. In a similar vein, it is often the very identification of ourselves as gay people that provokes the discrimination we suffer. A lesbian couple who fly the rainbow flag (often a symbol of pride in our sexual orientation) in front of their home awaken to a violent attack upon their property. A gay man who, out of dignity and honesty, reveals his sexuality at work loses his job. A gay or lesbian couple cannot find housing because they introduce themselves as life partners. Gay or lesbian parents are declared unfit, and their children are taken away. In Colorado, we achieve a modicum of equality in isolated measures taken to afford to us the basic freedoms enjoyed by other people, and a State constitutional amendment is adopted that prohibits us even from claiming equal protection. If we articulate our sexual orientation, we must constantly confront a world of antagonism and suspicion.

This Court has a clear and unquestionable duty to guard our right to speak and to petition our school districts, our city and county governments, all levels of government, our Nation and its constituent States, and our fellow citizens. Through this Brief, we bring this interest before the Court.

SUMMARY OF ARGUMENT

In their defense of Amendment 2, Petitioners focus narrowly on the repeal of existing protection for gay people effectuated by Amendment 2. *E.g.*, Brief for Petitioners at 6. If Amendment 2 presented nothing more than a repeal, this Court could perhaps rely more comfortably upon the background assumption that the political branches and democratic processes generally would remain available to rectify any improvident decision. *See* Brief for Respondents at Arg. Sec. I.A.1. But Amendment 2 is far more than an instance of repealing legislation, and for this reason, the judicial assumption of available political processes must not become operative. Indeed, Amendment 2, in addition to excluding gay people in the present time by repealing all existing protection, operates prospectively to preserve that exclusion for all time. Respondents demonstrate that this second feature of Amendment 2, the prospective exclusion, unconstitutionally burdens the right to participate *equally* in the political process. The present Brief demonstrates that, wholly apart from an equal protection analysis, the means chosen to accomplish this second goal are also in direct violation of the right to participate (to speak and to petition) in the political process as guaranteed by the First Amendment.

Amendment 2 accomplishes its second goal, perpetuating the exclusion of gay people into the future and preventing any future adoption of protection, by suppressing the political speech that precedes the adoption of legislation. Specifically, Amendment 2 accomplishes this second goal 1) by establishing an absolute prohibition on even the making of a claim for protection and 2) by eliminating the capacity of government even to hear such a claim. The record in this case provides concrete examples of how this will work. Plaintiff Romero brought about protection from discrimination in the Denver Police Department by petitioning the Department, using a departmental grievance procedure, whether formal or informal, to consider adopting such protection. Likewise, Plaintiff Evans brought about protection in state government by petitioning the Governor, using a state rulemaking procedure, to consider adopting such protection. *See* Brief for Respondents at Statement of Case Sec. II.A. Among the many other things it will do, Amendment 2 will prohibit Romero, Evans, and others from using such state and local procedures in the future to make a claim

for—to speak out for, to advocate for, to petition for—the adoption of such protection. And the Amendment will also eliminate the capacity of the Denver Police Department, the Governor, and all other state and local branches and levels of government to hear, or even to receive, such a petition.

This Brief demonstrates that, in these aspects at the very least, Amendment 2 transgresses the First Amendment in four ways. The prohibition on the making of a claim for protection violates well-settled First Amendment doctrines condemning 1) content restrictions, 2) speaker restrictions, and 3) discriminatory access to public fora. These doctrines and the protections they afford are supported by both the Speech Clause and the Petition Clause.

This Brief submits that Amendment 2's elimination of the capacity of government to hear such a claim violates an additional fourth protection supported by the Petition Clause. Mindful of this Court's decision in *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984), the Brief does not posit a (judicially enforceable) duty on the part of government to hear a petition. The Brief does not, and need not, posit a governmental duty corresponding to the citizen's right to petition. Instead, the Brief posits that, in light of its language, its history, and its place in our constitutional structure, the Petition Clause protects the capacity of representative government—in Hohfeldian terms, the *power* [1]—to receive; to listen to; to be informed by; to entertain; and when appropriate, to respond meaningfully to a petition.

It is precisely because Amendment 2 so alters the inherited structure of democratic self-government that the judicial assumption of rectification through the political process must not be allowed to become operative in this

[1] *See* H.M. HART, JR. & A.M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 141-79 (tent. ed. 1958).

case. Amendment 2 not only undermines impartial democratic process, *see* Brief for Respondents at Arg. Sec. I.A.1, it also dismantles the process itself.

ARGUMENT

It has been said that the civic religion of the United States is human rights. This civic religion first found expression in the concept of universal citizenship. The Declaration of Independence proclaimed a precivic, natural, and God-given citizenship for all human beings: "all men are created equal," and "they are endowed by their Creator with certain unalienable rights." When the United States Constitution followed, it used the word *citizen* to give civic expression to this belief in the full and equal dignity of every person. Despite the reference to men, these formulations have always been rightly understood to mean women and minors as well. *See Dred Scott v. Sandford*, 60 U.S. 393, 422 (1856) (opinion of the Court per Taney, C.J.)

Perhaps more important than the actual rights, privileges, and immunities bound up in citizenship is the principle that each and every person is entitled to full and equal participation in those rights whatever they may be. The content of these privileges and immunities has been found, at least in part, in the concept of ordered liberty. *See Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986). But the ultimate guarantee of liberty resides much more in the promise of full and equal participation by everyone. A right granted to one must be afforded to all others. And if a right is to be denied to one, all others must suffer a like deprivation. *See Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972). It is in the rigorous and vigilant application of the principle of equality, inherent from the beginning in the promise of full and *equal* citizenship *for all*, that we can best preserve against the fencing-out of any one of us.

It may be that this Court has begun to doubt the legitimacy of its fundamental rights jurisprudence, at least

when called upon to acknowledge these rights in certain despised classes of citizens, on the ground that these rights are not "textual." *See Bowers,* 478 U.S. at 191, 194-95. On the textualist's objection, it is instructive to consider the views advanced in the concurring opinion filed by Justice Scott in the Colorado Supreme Court. Justice Scott maintains that, but for the mistake of the *Slaughter-House Cases,* 83 U.S. 36 (1873), the present case and many others would be governed by the substantive entitlements afforded by the Privileges or Immunities Clause of the Fourteenth Amendment. *See Evans v. Romer,* 882 P.2d 1335, 1356 (1994) (Scott, J., concurring). Indeed, viewed from this perspective, much of this Court's substantive due process and fundamental rights jurisprudence, and even the incorporation doctrine, are not so much nontextual exercises in judicial illegitimacy as they are compensating mechanisms: that is, doctrines developed to compensate for the mistake of the *Slaughter-House Cases* and to realize the express and *textual* promise of the Privileges or Immunities Clause. *Cf. id* at 1353-54. In light of Justice Scott's assessment of the controlling significance (but for the *Slaughter-House* rule of decision) of the Privileges or Immunities Clause, it would be wise to recall what necessitated the Clause. This Clause was given top billing in the Fourteenth Amendment because the Clause, together with the opening sentence of the Amendment, was designed to overrule the *Dred Scott* decision, the classic fencing-out decision of American judicial history.

I. THE WELL-WORN TECHNIQUES FOR EXCLUDING A MINORITY: IF TYRANNY IS YOUR AIM, "IF YOU HAVE NO DOUBT OF YOUR PREMISES OR YOUR POWER," THEN *FIRST,* YOU PUT YOUR EXCLUSION "IN LAW" NOW AND, *SECOND,* YOU "SWEEP AWAY ALL OPPOSITION" NOW AND INTO THE FUTURE SO AS TO PRESERVE THAT EXCLUSION FOR ALL TIME [2]

Mr. Scott brought a claim to be free of Mr. Sanford's assaults. Sanford defended by claiming a slaveholder's privilege to lay his hands upon and imprison Scott and family. Further, Sanford challenged even Scott's right to make a claim, on the ground that Scott was assertedly not a citizen. If Scott had no citizenship, then he had no right to make a claim, one of the privileges of citizenship. *See* 60 U.S. at 396-99. The *Dred Scott* Court's fateful decision of this question of citizenship came in some two parts.

First, the Court acknowledged the universality of the language employed in the founding documents, the Declaration and the Constitution, and that this language and "the principles" thereby expressed would seem to "embrace the whole human family." *Id.* at 410. Nevertheless, the Court embarked upon an inquiry into who was "intended to be included" and who was "intended to be excluded" "at that time." *Id.* at 406-07. The "proof" of this original intent was to be divined through a survey of legislative acts, court decisions, and everyday practices throughout "the public history of every European nation" of "the English Government and English people," and of "the British colonies" up until the time that the Declaration and Constitution were framed (and possibly even thereafter into the early decades of the nineteenth century). *Id.* at 407-17. The Court found in this history not merely an original intent to exclude those who were enslaved. The Court found much more

[2] *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

an original intent to exclude all persons of African descent regardless of whether enslaved, once enslaved and later emancipated, or even never enslaved, say, because of recent immigration and (attempted) naturalization. *Id.* at 416-23. For every example where someone in this public history had broken free of the abysmal record of racism and had inched forward in realizing the promise of full and equal citizenship for all (in the abolition of slavery in some colonies and states for instance), the Court found a counterexample. Thus, even in these free states, the Court noted, some had remained "actively engaged in the slave trade, procuring cargoes on the coast of Africa, and transporting them for sale" in this country. *Id.* at 412. As between two such conflicting examples, the Court felt constrained to heed the latter example in its search for original intent. By these means, the *Dred Scott* Court drained the founding documents of principled content.

It was as if at the moment that Mr. Jefferson glimpsed new principles by which to organize a more nearly just polity and put them to paper, if at that moment it was beyond Jefferson's power to realize these principles instantaneously in the world about him, then his "intent" would rather be found in the examples set by the very old order he had vainly sought to revolutionize. Tragically, this completely neglected Jefferson's capacity to imagine a better way and his indisputable intention to bequeath that vision to posterity. Indeed, the entire polity would be held in check until the last blackheart slavetrader on the coast of New England had been persuaded to desist.

Put another way, this technique of constitutional interpretation may well be useful under certain carefully delimited circumstances. If, in a given instance, the Framers were merely constitutionalizing a preexisting rule of law, then it may be legitimate to survey public history to ascertain the content of that rule. When, however, the Framers were establishing new principles, when they were

writing a new page in world history, then it is nothing short of a travesty to purport to find the "intent" animating these new principles in the example of the old order they were squarely rejecting.

In 1856, the Constitution held no express guarantee of equal protection, but the equality principle has always been understood as the central meaning of justice. How did the *Dred Scott* Court formally introduce apartheid into America in the very teeth of this bedrock principle of justice? It was done by finding that African-Americans constitute "an inferior and subordinate class." *Id.* at 417; *see also id.* at 404-05, 416. If people of African descent were found to be inferior, why they would not be entitled to equal treatment. There seems to have been no consciousness that, in matters of this nature, even this Court's finding of inferiority in the person of the petitioner is utterly irrelevant. The entitlement to participate fully and equally in citizenship is a political and civic claim and not in any way contingent upon a factual showing of superior worth or even of equal worth.[3] The privileges and immunities attaching to citizenship are not contingent or conditional, but rather "unalienable."

Second, having embarked on the course of exclusion, the *Dred Scott* Court took the further step of disabling other political actors so that the scheme of apartheid would remain virtually unalterable. On why the exclusion had to cover, not only slaves, but all "persons of the negro race" including free persons, the Court candidly admitted that it was necessary in order to eliminate any entitlement to First Amendment rights: If free Blacks qualified as citizens, then

> It would give to persons of the negro race, who were recognised as citizens in any one State of the Union,

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[3] *See Adarand Constructors v. Peña*, No. 93-1841, —— U.S. —— (June 12, 1995) (Thomas, J., concurring) ("Government cannot make us equal; it can only recognize, respect and protect us as equal before the law").

> the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; *and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs* . . . .

Id. at 417; *see also id.* at 425. Having thereby suppressed the political voice of the people whose every last hope of liberty was being snatched away, the Court then also disabled the political branches from hearing that voice, specifically declaring Congress and the Executive to be without power to interfere with slavery in any way or even to pass laws protecting emancipated Black persons. *Id.* at 425-26; *see also id.* at 452.

By these means, Mr. Scott was rendered stateless. As a stateless person, Scott had none of the privileges and immunities of citizenship and therefore did not have the right even to assert a claim. Accordingly, his case was dismissed without the Court's ever having addressed the merits of his claim. *See id.* at 454.

For African-Americans, the *Dred Scott* decision was a one-act play with two devastating scenes. For gay Americans, the play is being rewritten as a two-act play. Retracing the first scene of the *Dred Scott* decision with remarkable fidelity, the *Bowers* decision was the first act. This Court's resolution of the present case could well be the second act.

The *Bowers* decision excluded gay Americans from participation in the fundamental rights of privacy and of intimate association. Of course, by insisting upon an "as applied" analysis; by disregarding the actual text of the Georgia statute (which made no reference to the gender mix of those committing "sodomy"); by ignoring the possibility of heterosexual plaintiffs regardless of whether "John and Mary Doe" had standing; and perhaps most important, by arbitrarily redefining the fundamental right to be "a fundamental right to homosexuals" only to engage in "consensual homosexual sodomy," *see* 478 U.S. at 188 n.2, 192, the *Bowers* Court stacked the deck. But one might ask why Mr. Scott was, in similar fashion, perceived by this Court exclusively in terms of being Black, Negro, and African, but never as a human being pure and simple. In both cases, the Court gave the appearance of devaluing the right at issue, at least in the hands of certain rightholders, because of a low appraisal of the worth of the rightholder. There was, moreover, in *Bowers* the same evasion of principle and the same recourse instead to a purportedly original intent to be proven by historical examples of blackhearted oppression dating back to the ancient Romans and beyond. *See id.* at 192-94; *see also id.* at 196-97 (Burger, C.J., concurring).

The Court said that it would come "nearest to illegitimacy" to acknowledge these fundamental rights in gay Americans. *Id.* at 194. If the Court was truly seized with doubt in 1986 about its fundamental rights jurisprudence, there was at least one remaining overriding principle with which to contend. The Court said that there was no equal protection claim before it. *Id.* at 196 n.8. But it seems to have been totally unconscious of the duty of judges, too, *see Shelley v. Kramer*, 334 U.S. 1 (1948), to observe the principle, the supreme principle, of equality. *See Planned Parenthood v. Casey*, —— U.S. ——, 112 S. Ct. 2791 (1992) (opinion of the Court per O'Connor, J.; Kennedy, J.; and Souter, J.); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) (opinion of the Court per Souter, J.); *see also Adarand Constructors*, —— U.S. at —— (Thomas, J., concurring) ("the principle of inherent equality that underlies and infuses our Constitution"). Even if some constitutional value was deemed to be offended by fundamental rights, that value was nonetheless subordinate to the

supreme constitutional principle of equality. Because the rights had been recognized in others, rigorous application of the equality principle demanded that the rights be recognized in all. As in *Dred Scott*, the only purported escape from the equality principle would have been a finding of the inferiority of gay people, of their capacity to be loving human beings, and of their intimate relationships of companionship and family. Indeed, later courts have found evidence in the *Bowers* opinion that the Court endorsed this assertion of inferiority.[4]

Branded with this Court's imprimatur of criminality; immorality; and in a word, inferiority, gay people were robbed of an essential part of what it means to be a human being of full and equal dignity.[5] As citizens, they were reduced to the barebone rights of self-defense embodied in the First Amendment. Even while bearing the brand of inferiority and all the injurious consequences (the relentless discrimination in the workplace, in housing, in family relations) flowing therefrom, at least they had the bare minimum of First Amendment rights to

[4] *E.g., Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 1995 U.S. App. LEXIS 10462, at *9-*16 (6th Cir. May 12 & 17, 1995); *Steffan v. Perry*, 41 F.3d 677, 684 (D.C. Cir. 1994) (en banc); *High Tech Gays v. Defense Indus. Security Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068, 1075-76 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Padula v. Webster*, 822 F.2d 97, 102-03 (D.C. Cir. 1987); *see also Bowers*, 478 U.S. at 196.

[5] The right of intimate association has been said to encompass values as essential to human dignity and happiness as opportunities for caring, commitment, and love. *See* Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 630-36 (1980). Short of changing their gender through surgery, gay people are now denied the liberty to pursue these opportunities. *Cf. id.* at 658; *Loving v. Virginia*, 388 U.S. 1 (1967). Nor will it do to say that only the most casual of relationships have been forbidden for it is by casual beginnings that human beings develop their most durable intimate associations. *See* Karst, *supra*, at 633; *cf. Eisenstadt*, 405 U.S. at 453.

attempt to persuade a hostile majority to acknowledge their humanity. And in this one particular, the *Bowers* decision did differ from the *Dred Scott* decision; because the *Bowers* Court expressly acknowledged that there was "no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy." *Bowers*, 478 U.S. at 190. The instant case presents the question whether gay people will retain even this right to speak out, to advocate, to petition, and to claim recognition of their full and equal dignity—the right to participate in the political processes of this Nation.

II. AMENDMENT 2 FOLLOWS THE HISTORIC PATTERN OF EXCLUSION: IT EXCLUDES GAY PEOPLE IN THE PRESENT AND GUARANTEES THAT RESULT INTO THE FUTURE BY SUPPRESSING FIRST AMENDMENT RIGHTS

Again following the historic pattern of exclusion, Amendment 2 is designed to accomplish two goals. First, to the fullest extent of Colorado's power, the Amendment repeals all existing legal protection for gay people. Second, having fenced out gay people in the present time, the Amendment would seek to freeze that result and make it unalterable for all time. The means chosen to accomplish this second goal—1) an absolute prohibition on even the making of a claim for protection and 2) an incapacitation of government even to hear such a claim—are in direct violation of the rights guaranteed by the First Amendment.

Amendment 2 prohibits the use of any state or local procedural vehicle or setting [6]—and, further, prohibits any state or local government actor [7] from permitting the

[6] Under "any statute, regulation, ordinance or policy." Amendment 2.

[7] The "State of Colorado, through any of its branches or departments, . . . any of its agencies, political subdivisions, municipalities or school districts." Amendment 2.

use of any state or local vehicle[8]—"*to* have or *claim* any minority status, . . . *protected status* or claim of discrimination."[9] The Amendment uses the phrase *to claim*, a verb or action word. It prohibits even the making, or speaking, of a claim. The Amendment prohibits even the making of a claim seeking protection from discrimination based on "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." *Accord* Brief for Respondents at Arg. Sec. I.B.1 (citing State's expert witness Finnis); Brief *Amici Curiae* of Christian Legal Society, et al. at 21. And all state and local officials are likewise instructed to deny all their procedures, to turn a deaf ear, even to the making of a claim for the protection of gay people.

This second goal (freezing a result for all time) apparently presented the drafters of Amendment 2 with an age-old dilemma. One of the virtues of the republican form of government, resting upon principles of democracy and self-governance, is that it will be capable of adapting and thus ever-changing. Working hand in glove with principles of our collective democracy are the First Amendment rights of each individual citizen. In good

[8] No state or local governmental actor "shall enact, adopt or *enforce*." Amendment 2.

[9] Petitioners have misquoted Amendment 2 in their briefing before this Court, performing a certain elision at critical passages in the text of the Amendment. *See* Petition for Writ of Certiorari at 2; (Uncorrected) Brief for Petitioners at 2. The full and correct text of Amendment 2, as now codified, is as follows:

> Section 30b. No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons *to* have or *claim* any minority status, quota preferences, *protected status* or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

times and bad times alike, First Amendment rights are rights of self-determination that may be exercised for political purposes or for wholly nonpolitical purposes. *See Cohen v. California,* 403 U.S. 15, 24 (1971). But especially in bad times, when faced with a hostile majority, the individual's First Amendment rights become rights of self-defense in the political arena. *See* Blasi, *The Pathological Perspective and the First Amendment,* 85 COLUM. L. REV. 449, 449-50 (1985). First Amendment rights "are means indispensable to the discovery and spread of political truth" and are a necessary predicate to "political change." *Whitney v. California,* 274 U.S. 357, 375, 377 (1927) (Brandeis, J., concurring). For an unpopular and embattled minority, these rights are quite simply the ticket to continued participation in our self-governing democracy. They enable each citizen to remain a part of the collective "self" of self-governance. *See Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964). And that ticket also creates the potential that its holder may someday be successful in bringing about political change. This is a desideratum in our political and constitutional structure. Indeed, it "*is* the theory of our Constitution." *Abrams,* 250 U.S. at 630 (Holmes, J., dissenting). Without at least the potential for political change, First Amendment rights and, indeed, participation in the political processes of self-governance would become exercises in futility. And our government would likewise lose the capacity to adapt.

For those who would forever forestall such political change, the words of Justice Holmes are instructive: "If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition." *Id.* Justice Holmes was discussing, not merely psychology, but political necessity. In order to forestall all potential for political change, one must disable the mechanisms of democracy, and that means suppressing First Amendment rights. The *Dred Scott* Court knew this when it suppressed the political voice even of emanci-

pated Blacks. And the drafters of Amendment 2 knew this as well.[10]

The making of a claim is a privilege of citizenship; the *Dred Scott* decision tells us this much. The making of a claim in an adjudicatory setting, whether judicial or administrative, is likewise expressive activity protected by the First Amendment. *NAACP v. Button*, 371 U.S. 415 (1963); *see also McDonald v. Smith*, 472 U.S. 479, 484 (1985). And lest there be any lingering doubt about the applicability of the First Amendment to the States, it is worth noting that, before the incorporation doctrine became second nature, this Court freely acknowledged that First Amendment rights are among "the privileges, immunities, rights, and liberties of citizens." *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515-16 (1939) (at least, with an apparent nod to the *Slaughter-House* rule, when expression bears upon "national questions").

But claim-making also has a broader signification, one fairly synonymous with petitioning. *See McDonald*, 472 U.S. at 488 & n.2 (Brennan, J., concurring) (collecting cases showing different kinds of petitioning). And this broader sense is the one used in Amendment 2 for it prohibits claim-making in any and all conceivable pro-

[10] Petitioners, in their defense of Amendment 2, display the same mindset when they assert that Amendment 2 is the best way to deal with the divisive, political issue of gay people. Thus, Petitioners suggest that Amendment 2 is ultimately the best way because it uniformly denies protection to gay people and, at the same time, uniformly eliminates all further discussion of the issue. *See* Brief for Petitioners at 47-48. Colorado's ultimate solution for the "gay problem" is not only deeply offensive, it is not even Colorado's choice to make. The First Amendment long ago made the choice of remedies: Absent an emergency, " 'the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.' " *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 97 (1977) (quoting *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring)); *see Crist v. Murray*, 1995 U.S. LEXIS 3622, at *10 (May 30, 1995) (Scalia, J., concurring).

cedural settings[11] for proceedings by or before any and all conceivable governmental actors.[12] Petitioning, of course, is expressly protected by the Petition Clause of the First Amendment.

III. AMENDMENT 2 TRANSGRESSES THE FIRST AMENDMENT IN FOUR WAYS

Colorado's prohibition on claiming and petitioning directly transgresses the First Amendment in at least three well-settled ways, and in a fourth way that flows directly from the Petition Clause.

Content Restriction. First, it is long-since established territory that the First Amendment will not brook a speech prohibition that turns on the content of speech: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972). Colorado's Amendment 2 does not prohibit the making of all claims. The Amendment prohibits only the making of those claims that would seek protection for gay people on account of "minority status" or "protected status" (status in the sense of "homosexual, lesbian or bisexual orientation") or that would seek protection from "discrimination" based on such orientation, conduct, practices, or relationships. Claims seeking protection and freedom from all other kinds of discrimination may be made and entertained. Indeed, all other kinds of claims, whether having to do with discrimination or not, are left untouched. Only the making of claims with the content as specifically described in Amendment 2 is prohibited. Indisputably, Amendment 2 establishes an impermissible content restriction.

[11] All those procedures established under "any statute, regulation, ordinance or policy." Amendment 2.

[12] The "State of Colorado, . . . any of its branches or departments, . . . any of its agencies, political subdivisions, municipalities or school districts." Amendment 2.

Speaker Restriction. Second, the First Amendment will not brook a speech prohibition that distinguishes among speakers, permitting some speakers while barring other speakers. *See First Nat'l Bank v. Bellotti,* 435 U.S. 765, 784-85 (1978). By its terms, Amendment 2 describes the speakers it prohibits from making a claim as "any person or class of persons." The reference here to a certain "class of persons" betrays the intended speaker restriction. It is not difficult to understand which "class" of speakers might wish to petition for the protection of gay people. Indeed, this class of persons is twice specifically described in Amendment 2: all those persons of "homosexual, lesbian or bisexual orientation." The political reality is that it is gay people and only gay people who, in their own self-defense, will petition for the protection of gay people. The Colorado Supreme Court had no difficulty in finding that Amendment 2 capitalizes on this political reality and that, when it bars speakers described as a certain *class of persons,* the Amendment "expressly fences out" and "singles out" a "class of persons [consisting of] gay men, lesbians, and bisexuals." *Evans v. Romer,* 854 P.2d 1270, 1284 (1993). This interpretation of Colorado law by the Colorado high court is binding upon this Court.[13] And it likewise establishes beyond doubt the speaker restriction in Amendment 2.

Beyond statutory exegesis, the speaker restriction in Amendment 2 is readily apparent when one considers some of the important, foreseeable applications of the

[13] *See, e.g., North Carolina v. Butler,* 441 U.S. 369, 376 n.7 (1979); *Landmark Communs., Inc. v. Virginia,* 435 U.S. 829, 837 n.9 (1978); *Ward v. Illinois,* 431 U.S. 767, 772 (1977); *Eastlake v. Forest City Enters., Inc.,* 426 U.S. 668, 674 n.9 (1976); *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n,* 426 U.S. 482, 488 (1976); *Mullaney v. Wilbur,* 421 U.S. 684, 691 (1975); *Memorial Hosp. v. Maricopa County,* 415 U.S. 250, 256 (1974); *O'Brien v. Skinner,* 414 U.S. 524, 531 (1974); *Wardius v. Oregon,* 412 U.S. 470, 477 (1973); *Groppi v. Wisconsin,* 400 U.S. 505, 507 (1971).

Amendment's speech prohibition. In future adjudicatory proceedings, whether in state or local court or before an administrative agency, a petitioner may wish to claim Federal equal protection or Colorado equal protection to be free of discrimination against gay people. *Even if that protection gives rise at most to rational basis scrutiny,* the petitioner's plea would clearly transgress Amendment 2's prohibition on making such claims. *See* State's opening brief, Colo. Sup. Ct., No. 93SA017 (State's concession regarding "supremacy problem"). Moreover, because of familiar rules of standing, in most cases, only a gay person could even assert such a claim. *See Bowers,* 478 U.S. at 188 n.2. At that point, standing rules and Amendment 2 will merge to silence gay people and only gay people. The speaker restriction is palpable.

Public Forum. Third, the First Amendment will not brook a speech prohibition that establishes discriminatory access to a public forum. *See Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975). Every proceeding where the Amendment 2 speech prohibition will apply will be, by definition, a government-provided forum (that is, all those fora provided for by "any statute, regulation, ordinance or policy"). And in many of the important, foreseeable applications of Amendment 2, this government forum will be an indisputably public forum. Consider Amendment 2's express mention of "school districts." The place for making a claim for the protection of gay people in school districts would naturally be at the school board meeting. Nearly two decades ago, this Court had no difficulty in declaring school board meetings to be public fora. *See City of Madison v. Wisconsin Employment Rels. Comm'n,* 429 U.S. 167, 169, 174-75 (1976). The same will be true of countless other governmental fora where Amendment 2's speech prohibition will be brought to bear: university trustee meetings, county board meetings, city council meetings, state legislative committee meetings, and on and on. The rollback of First Amendment rights is simply staggering.

Perhaps the most sinister application of Amendment 2 to a public forum will come if ever there is an attempt to submit a new round of petitions to the Colorado Secretary of State in order to use the initiative procedure, itself a form of public forum, to repeal Amendment 2. In that instance, Amendment 2's prohibition on certain kinds of petitioning could very well serve as a basis for enjoining such access to the initiative procedure. Or the Colorado Secretary of State (clearly one of the "departments" or "agencies" specified in Amendment 2) could very well be compelled to reject the initiating petitions as a violation of Amendment 2's petitioning prohibition.

Petition Clause. Finally, this case has serious distinct implications for the Petition Clause of the First Amendment. Over the years, the protections afforded by the Petition Clause have seldom been developed because these protections were frequently assumed to be subsumed within the protections afforded by the other clauses of the First Amendment. *See, e.g., McDonald*, 472 U.S. at 488 n.2 (Brennan, J., concurring). Serious recent legal scholarship disputes this assumption. *See, e.g.*, Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 143 n.2 (1986). There is no doubt that all the expression protected by the Petition Clause is also protected by the other clauses. The question is whether the Petition Clause provides additional protections, protections greater than or different from those of the other clauses. The language of the Petition Clause, its place in our constitutional structure, and the history of the Clause all suggest that it does. Indeed, the right to petition has been regarded as so important to our system of self-government that some have considered it *one of "the citizenry's two constitutional means* of approaching the government: periodic election and continual instruction through petitioning." *Id.* at 162 (footnote omitted, characterizing the views of John Quincy Adams).

All the expressive activity protected by the Petition Clause is almost by definition expression addressed to government. *See California Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 510-11 (1972) (all branches or levels of government, whether state or Federal). And the nature of that expression is by definition an appeal, a petitioning, by a constituent for the kind of "redress of grievances" that government can provide—in other words, for a meaningful response by government to its citizen. This language suggests that the Petition Clause is keenly interested in preserving, not only the citizen's right to make a petition, but also the government's ability to hear; to entertain; and if appropriate, to respond meaningfully to that petition. Whereas the Speech Clause may in some settings protect only the right to speak out, the Petition Clause also protects, in political matters, the right "to be heard." *California Motor*, 404 U.S. at 513. In structural terms, the Petition Clause is, as noted, necessary for the citizen's participation in self-government. Moreover, it is necessary "to preserve the informed operation of governmental processes." *Id.* at 516 (Stewart, J., concurring).

In 1984, the Court tended to make the alarming suggestion that, of these two constitutional means available to address government, only one remained: voting "at the polls." *See Knight*, 465 U.S. at 285. The narrow question before the *Knight* Court, however, was whether the First Amendment gave to citizens a "constitutional right to force the government to listen to their views." *Id.* at 283; *see also id.* at 285. The *Knight* Court rejected this asserted right to force government to listen, citing the difficulty of judicial definition and enforcement and pragmatic concern over the efficiency of conducting government. *See id.* Unwittingly, the *Knight* Court tended thereby to lend credence to a theory of the right to petition first developed by John C. Calhoun and other representatives of the slave states in their efforts to preserve slavery and stifle all further discussion of it. *See* Higgin-

son, *supra,* at 159-61, 165-66. Indeed, the debate at the time of the ratification of the Bill of Rights expressly confirmed a much different understanding of the right to petition. *See id.* at 155-56; *see also id.* at 156 n.98 ("right to consult Congress is non-binding, but Congress has responsibility never to shut its ears to petitions (statement of E. Gerry)").

In the present case, there is, however, no occasion for reconsidering the *Knight* holding. There is no need to posit a right to force government to listen in order to show Amendment 2's incompatibility with the Petition Clause. Amendment 2 operates in a different fashion. The Amendment prohibits governmental actors from listening to a petition and thereby informing themselves regardless of whether they are willing to listen. The Amendment disables even willing governmental listeners. Unlike the *Knight* case, there is no question of compelling government to listen. Amendment 2 eliminates the very capacity of government, irrespective of willingness, to listen to or even to receive a petition.

This is a serious dismantling of the accepted structure of self-government. All the petitioning prohibited by Amendment 2 is, seemingly, petitioning addressed to government. In this way, Amendment 2 presents a striking parallel with the Petition Clause itself. The two are virtually coextensive; all that which Amendment 2 prohibits is that which the Petition Clause protects. And Amendment 2 is designed, not only to suppress the petitioner, but also to disable every possible governmental actor in Colorado from even receiving—much less listening to, being informed by, entertaining, and meaningfully responding to—a claim for the protection of gay people. *See Evans,* 882 P.2d at 1355 (Scott, J., concurring). It is in this way a near perfect disabling of the political mechanisms of democratic self-governance—a step, as noted, the drafters of Amendment 2 had to take in order to forestall all potential for political change in the future.

CONCLUSION

For all these reasons, these Amici Curiae respectfully urge this Court to affirm the decision of the Colorado Supreme Court.[14]

Respectfully submitted,

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[14] Pursuant to Supreme Court Rule 37.3, the written consents of all parties to the filing of this Brief have been filed with the Clerk.